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In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 40

ELIZABETH ROSALIA WOODBY, PETITIONER

v.

IMMIGRATION AND NATURALIZATION SERVICE

**ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE SIXTH CIRCUIT**

BRIEF FOR THE RESPONDENT

OPINION BELOW

The opinion of the court of appeals (R. 127) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on September 16, 1965. The petition for a writ of certiorari was filed on December 15, 1965, and was granted on April 18, 1966 (R. 127-133; 384 U.S. 904). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the Attorney General found the factual grounds for deportation with the requisite degree of persuasion.

(1)

2. Whether the court of appeals erred in holding that the deportation order was supported by reasonable, substantial and probative evidence on the record considered as a whole.

3. Whether the court of appeals erred in declining to remand the case to the Immigration Service as authorized by 5 U.S.C. 1037(c).¹

STATUTES INVOLVED

Section 241(a)(12) of the Immigration and Nationality Act, 8 U.S.C. 1251(a)(12), requires the deportation of any alien who:

“by reason of any conduct, behavior or activity at any time after entry became a member of any of the classes specified in paragraph (12) of section 212(a); * * *.”

Section 212(a)(12) of the Immigration and Nationality Act, 8 U.S.C. 1182(a)(12), bars the entry into the United States of:

“Aliens who are prostitutes or who have engaged in prostitution * * *.”

Section 242(b) of the Immigration and Nationality Act, 8 U.S.C. 1252(b), prescribes the procedure in deportation cases, directs that “no decision of deportability shall be valid unless it is based upon reasonable, substantial, and probative evidence” and declares that “The procedure so prescribed shall be the sole and exclusive procedure for determining the deportability of an alien under this section.”

Section 106(a)(4) of the Immigration and Nationality Act, as amended, 8 U.S.C. 1105a(a)(4), deals

¹ 5 U.S.C. 1037(c) has been recodified as 28 U.S.C. App. 2347(c) by Act of September 6, 1966, P.L. 89-554, 80 Stat. 378, 623.

with the judicial review of deportation orders, and provides (with exceptions not relevant here) that the petition for review "shall be determined solely upon the administrative record upon which the deportation order is based and the Attorney General's findings of fact, if supported by reasonable, substantial, and probative evidence on the record considered as a whole, shall be conclusive."

STATEMENT

Petitioner is an alien, a native of Hungary and a citizen of Germany. She entered the United States on February 7, 1956, and is now 34 years old (R. 37, 74). While in Germany she married John Henry Woodby, an American citizen, on January 8, 1955. A daughter was born to them in Germany on April 7, 1955. After coming to the United States she lived with her husband briefly, and a son was born to them on August 13, 1956. Petitioner and her husband separated in December 1956, and never again lived together (R. 10-11, 55-58, 77). Her husband died on July 14, 1958 (R. 10), and she has not remarried. Her two children have been with their paternal grandparents for several years, pursuant to a court order awarding custody to them (R. 11, 65-66).²

1. In 1961 petitioner appeared voluntarily and with counsel before immigration officers who interrogated

² Petitioner testified that temporary custody of the children had been awarded by the court to the grandparents and that she had instituted court proceedings to regain custody (R. 65-66). Investigations of the Immigration and Naturalization Service, not shown in the record, indicate that petitioner's attempts to regain custody of the children were unsuccessful and that (as of September 12, 1966) the children were still in the legal custody of the grandparents, pursuant to court order.

her (R. 9-31). As the result of petitioner's admission to the immigration officers that she had been engaged in prostitution (R. 22-23), deportation proceedings were commenced against petitioner by order dated January 9, 1962 (R. 32-34). A hearing was held on March 28, 1962, before a special inquiry officer at which petitioner and three witnesses were examined by counsel for petitioner and for the Immigration Service (R. 35-73). Petitioner admitted that she had engaged in prostitution for a period of several months in 1957. She contended, however, that the acts of prostitution were committed under duress. Although petitioner gave several contradictory accounts of the nature and duration of her involvement in prostitution, the gist of her story was as follows:

Petitioner's second child was born prematurely on August 13, 1956 and was kept in the hospital for some time thereafter (R. 55-57). Shortly after the infant was brought to their home at 528 Notre Dame Street, Dayton, Ohio, in about December 1956, petitioner and her husband quarreled, and petitioner went to visit a friend in Pennsylvania (R. 57, 65). She stayed only one day and upon her return found that her husband had taken the infant to his parents' home near Harlan, Kentucky, where the older child was already staying (R. 58). Petitioner then got a job at McCrory's, a five and dime store in Dayton, which she kept for about three months (R. 59). She subsequently moved to a new apartment at Summit Court and became a waitress at Neil's Restaurant (R. 59). While living at Summit Court, she received a telephone call from her husband who told her that the baby was very sick and required a serious operation, that \$300 was needed

for hospital expenses, and that he expected her to raise the money (R. 44, 59-61). The following day a vacuum cleaner salesman named Tom Wally called at her home. When she told him of her financial plight, he suggested that she could earn the money she needed as a prostitute; Wally offered to lend her the needed \$300 and to serve as her procurer if she would agree (R. 44-45, 61-62). She accepted this proposition and immediately began to work as a prostitute on a part-time basis, since she was also working as a waitress. Her involvement in prostitution continued until she had accumulated the \$300 necessary to repay Wally (R. 62). She then told Wally she was quitting, and he threatened to expose her to the authorities; she continued for another two weeks or so and then terminated her involvement with Wally (R. 45-46). Although petitioner testified that her relationship with Wally halted after about two months (R. 47), petitioner's testimony does not expressly identify the time at which she abandoned prostitution. However, both in her statement of November 20, 1961 (R. 24, 25) and in her testimony on March 28, 1962 (R. 46), she linked the abandonment to her meeting with Anthony Amicon, which occurred not earlier than October 1957 (R. 50, 121). Petitioner also testified that, either in 1957 or 1958 (R. 64), she spent three months working as a waitress at the Brown Derby in Knoxville, Tennessee, and that during that period she did not engage in prostitution (R. 63). In her statement of November 20, 1961, she said that the stay in Knoxville was occasioned by her eviction from her Summit Court apartment as a consequence of the

landlord's discovery that another of Wally's girls was using her apartment for prostitution (R. 30-31). The three month stay in Knoxville ended on a fourth of July when petitioner asked her friend Arlene Jackson to drive her back to Dayton (R. 63).

Anthony Amicon was called as a witness by the government (R. 49). He testified that he had met petitioner around October 1957 (R. 50) (he had previously fixed the date as December 1, 1957 (R. 4)). That meeting took place at Neil's Restaurant where she was employed and where he went to eat with a friend who told him that petitioner was "in the business" of prostitution (R. 3, 50). That same evening, at petitioner's invitation, he called at her apartment at 1500 West Riverview in Dayton (R. 3, 50). Although he gave her \$10 they did not have sexual intercourse on that occasion, because "when it actually came down to the thing I couldn't go through with it. When I left I left the money anyway" (R. 3, 51). However, they commenced having sexual relations about two or three months later, after which "sex turned into love" (R. 4, 53). Amicon was then married, but was separated from his wife (R. 2, 52). He also testified that he was arrested by police in petitioner's apartment on February 27, 1959, and at that time signed a statement that he was then paying petitioner for acts of prostitution. However, he denied that his statement was true, alleging that he had signed it in order to help petitioner (R. 5).

Arlene Jackson was called as a witness for petitioner (R. 67). She testified that she had lived with petitioner for a period of about two and a half years

prior to February 1961 (R. 68). That period began on a July 4—presumably in 1958—when Mrs. Jackson drove to Knoxville, Tennessee, and brought petitioner back to Dayton, where they eventually settled at 1500 West Riverview (R. 68). Mrs. Jackson testified that petitioner had a good reputation and did not entertain any men during the time they lived together (R. 69).

Juanita Lewis was called as a witness for petitioner (R. 70). She testified that petitioner had a good reputation and was a good housekeeper. She also testified that she had frequently visited with petitioner while petitioner was living with Mrs. Jackson and had never seen men in her house (R. 71).

2. Following the hearing, the special inquiry officer, in an opinion dated October 30, 1962, found petitioner deportable (R. 74-79). He characterized petitioner's testimony as "a hard story to believe". However, he concluded that, even if her story of financial need occasioned by the illness of her child were sufficient to constitute duress, "a careful study of the record discredits that story" (R. 77), because the evidence demonstrated that she had continued to practice prostitution long after the alleged financial need had ended. Petitioner's appeal to the Board of Immigration Appeals was dismissed on March 8, 1963 (R. 108, 112). The Board found that even if petitioner's "bizarre story" were accepted, "it is clear from the evidence that she continued to practice prostitution until at least late 1957 or 1958, long after she had repaid the loan to the vacuum cleaner salesman" (R. 112). Petitioner sought reconsideration by motion filed May 17, 1963 (R. 115, 118-121), which was

denied by the Board on May 27, 1963 (R. 123-125). On petition for review, the court of appeals affirmed (R. 127-133). The court held that the deportation order was supported by reasonable, substantial, and probative evidence on the record considered as a whole and that the denial of the motion to reconsider was not an abuse of discretion (R. 132).³

ARGUMENT

INTRODUCTION AND SUMMARY

Under Section 212(a)(12) of the Immigration and Nationality Act (8 U.S.C. 1182(a)(12)), an alien who engages in prostitution is deportable. That provision, which is to be distinguished from those which provide for the deportation of aliens convicted of crimes (Section 212(a)(9) and (10), 8 U.S.C. 1182(a)(9) and (10)), has been a feature of our immigration law for a great many years. See Act of February 20, 1907, Section 3, 34 Stat 898, 899; Act of February 5, 1917, Section 19, 39 Stat. 874, 889; cf. Act of March 3, 1875, 18 Stat 477; *Bugajewitz v. Adams*, 228 U.S. 585; *Costanzo v. Tillinghast*, 287 U.S. 341. The constitu-

³ Finding that the Board's order must be affirmed, the court of appeals declined to consider the Immigration Service's contention below that, since the petition for review had been filed more than six months after the deportation order but within six months after the denial of the motion for reconsideration, judicial review was limited, under Section 106(a)(1) of the Act (8 U.S.C. 1105a(a)(1)), to the question whether the latter order entailed an abuse of discretion. Cf. *Giova v. Rosenberg*, 379 U.S. 18. Following the decision below, the Ninth Circuit has held, in similar circumstances, that it had jurisdiction to review the deportation order as well as a denial of a motion to reopen. *Bregman v. Immigration & Naturalization Service*, 351 F. 2d 401 (C.A. 9). In light of that decision, we abandon our contention below. Compare *Lopez v. Immigration & Naturalization Service*, 356 F. 2d 986 (C.A. 3), certiorari denied, October 10, 1966 (No. 380, this Term).

tional power of Congress to provide for deportation under such circumstances is not challenged in this case. Nor is it disputed that petitioner is in fact an alien who engaged in prostitution. Petitioner's principal contention is directed at the finding of the special inquiry officer and the Board of Immigration Appeals that her defense of duress was inadequate to account for her activities as a prostitute because it appeared from the evidence that those activities continued after the alleged duress had terminated. In particular, petitioner contends that (1) the inquiry officer and the Board did not reach the finding with the requisite degree of persuasion; and (2) the court of appeals erred in holding that that finding was "supported by reasonable, substantial, and probative evidence on the record considered as a whole," as required by Section 106(a)(4) of the Act (8 U.S.C. 1105a(a)(4)).

Both the degree of persuasion required of the factfinder and the scope of review appropriate to the court of appeals are discussed at length in our brief in *Sherman v. Immigration and Naturalization Service*, No. 80, this Term; we incorporate that discussion by reference rather than repeat it here. We urge in *Sherman* that, while the trier of the facts must be affirmatively persuaded by substantial evidence that deportability is established, neither the "beyond a reasonable doubt" standard nor the "clear and convincing proof" standard is applicable. Here we show that the critical fact—relating to the alleged duress—was supported by substantial evidence which reasonably persuaded the trier of facts. We also urge that where, as here, the questioned finding goes only to the sufficiency of an affirmative defense, as to which the

burden of proof would normally rest on the proponent, it would be particularly inappropriate to require that the finding be made with any higher degree of persuasion than that displayed in the decisions of the inquiry officer and the Board. We further urge that any higher standard that might be advocated in the case of a longtime resident is inapplicable to these proceedings which were commenced five years after petitioner's arrival in this country. Finally, we contend that a review of the record plainly shows that the court below did not err in holding that the order was sustained by reasonable, substantial and probative evidence.

Petitioner's alternative contention is that the court of appeals erred in failing to remand the case to the Attorney General for the taking of additional evidence as petitioner requested. Petitioner relies on 5 U.S.C. 1037(c),⁴ which authorizes such remand upon a satisfactory showing that the applicant has additional, material evidence to adduce and that there were reasonable grounds for the failure to adduce such evidence previously. We show that, since petitioner made no showing whatsoever with respect to either of the statutory prerequisites, her contention here is without merit.

I

THE ATTORNEY GENERAL FOUND THE FACTUAL GROUNDS FOR DEPORTATION PERSUASIVELY ESTABLISHED, AND HIS ORDER IS SUPPORTED BY REASONABLE, SUBSTANTIAL AND PROBATIVE EVIDENCE.

Petitioner's principal contentions are that the findings of the special inquiry officer and the Board of

⁴ See footnote 1 at p. 2, *supra*.

Immigration Appeals are not supported by "reasonable, substantial and probative evidence" and that the facts were not found by them with the requisite degree of persuasion. This objection is necessarily directed to a narrow question of fact. Petitioner does not controvert the findings that (a) she is not a citizen or national of the United States, (b) that she entered the United States on February 7, 1956, and (c) that she engaged in prostitution after entry. Controversy is therefore confined to petitioner's plea that her engagement in prostitution was induced by duress.

Both the inquiry officer and the Board found petitioner's tale of the sick child and the opportune vacuum cleaner salesman implausible; they characterized it as "a hard story to believe" (R. 78) and "bizarre" (R. 112). The credibility of the story was not enhanced by the many inconsistent versions which petitioner proffered and her admissions of falsification (R. 27, 39). Nor was there any objective evidence—*e.g.*, evidence that she forwarded \$300 to her husband, leases, telephone toll records—to support petitioner's claim. Indeed, a comparison of petitioner's affidavit of May 1963 (R. 120-121) and her brief in this Court (Br. p. 9) suggests that her counsel are still unable to sort out a consistent account of her activities.⁵

⁵ Petitioner's affidavit (filed with the Board in support of her motion to reconsider) states that she engaged in prostitution from February to April 1957, that in April she fled from Dayton to Knoxville to escape her procurer, Tom Wally, and that she remained in Knoxville for three months until she returned to Dayton on July 4, 1957. Petitioner's brief urges that the record clearly shows that she engaged in prostitution for the two months following April 1, 1957, that she then (presumably in June) went to Knoxville, returning to Dayton

Notwithstanding these difficulties with petitioner's story, both the inquiry officer and the Board accepted the premise that she embarked on prostitution to raise \$300 for her son's operation. Furthermore, they assumed that petitioner's anxiety for her son could be sufficiently compelling to warrant a defense of duress. They thus declined to determine whether petitioner's circumstances were not somewhat less compelling than those previously held to warrant a finding of duress. See *Matter of M*, 7 I. & N. Dec. 251. Without questioning either the truth of petitioner's story or its legal sufficiency, they nevertheless found that the alleged duress was not coextensive with the prostitution for which it was supposed to account. Thus the Board found that "[e]ven if the respondent's story is to be believed" and "even if it be conceded that the circumstances under which she entered the practice of prostitution may have amounted to duress," nevertheless "it is clear from the evidence that she continued to practice prostitution until at least late 1957 or 1958, long after she had repaid the loan to the vacuum cleaner salesman" (R. 112). The Board concluded that under these circumstances the prostitution "cannot be defended on the ground of duress" (*ibid.*). Similarly, the inquiry officer found that "if her story about the loan be believed" and "[i]f as a matter of law the story she tells should make the defense of

on July 4 (Br. p. 9). Elsewhere, however, petitioner's Brief recognizes that her stay in Knoxville lasted "several months" (Br. 7). In addition, petitioner testified (R. 30-31) that she went to Knoxville because her landlord found out "that this Jo was practicing prostitution in my apartment" rather than in an attempt to escape from Tom Wally.

duress available," the evidence demonstrated that the prostitution continued until "long after she had repaid the salesman's loan" (R. 77, 78).

The factual controversy is thus narrowed to the question of when petitioner's activities as a prostitute terminated. Although petitioner urged that her illicit activities continued no longer than the two months needed to repay Tom Wally, or perhaps an additional two weeks (R. 23, 45-46), she also repeatedly associated their discontinuance with the beginning of her acquaintance with Anthony Amicon. In her pre-hearing statement she said "I met Mr. Amicon and he was the one who made me realize what I was doing" (R. 24). Also, "It was after I met Mr. Amicon that I quit the arrangement with Mr. Wally" (R. 25).⁶ Similarly, at the second hearing she testified concern-

⁶ Petitioner objects (Br. 16) to the administrative findings insofar as they were based on her own sworn pre-hearing statement (R. 9-34) or that of Amicon (R. 1-8). This contention was not raised in the court of appeals and is without merit. While the judicial rules of evidence are inapplicable to administrative proceedings (see *Bridges v. Wixon* 326 U.S. 135, 153-156, 175-176; Section 7(c) of the Administrative Procedure Act, 5 U.S.C. 1006(c), now recodified as 5 U.S.C. 556(d)) even under those rules it would have been proper to receive petitioner's own prior statement as within the admissions exception to the hearsay rule. See McCormick, *Evidence* (1954), Section 239. Both her statement and Amicon's were also admissible under the governing regulations. 8 CFR 242.14(c); Amicon testified at the hearing, was cross-examined by petitioner's counsel (R. 53), and reaffirmed the truth of his prior statement (R. 49), with one minor and immaterial correction (R. 50). The receipt of his statement was not objected to (R. 52). Contrary to petitioner's suggestion (Br. 16), petitioner's counsel plainly did have an opportunity to examine her statement before it was received at the hearing (R. 38); moreover, she had been accompanied by counsel when the statement was made (R. 9).

ing the termination of her activities (R. 46); "See, I met Mr. Amicon. He asked me—told me what I was doing." The proposition that petitioner did not abandon prostitution prior to her meeting with Amicon is strongly supported by additional testimony. Concerning her first meeting with Amicon, petitioner testified as follows (R. 25-26):

Q. The first time you met Mr. Amicon didn't he come to your apartment to have sexual relations with you?

A. Yes, he came for that but he did not after he came.

Q. Did he leave money in your room the first night he met you?

A. Yes.

Q. Why did you not have sexual relations with Mr. Amicon?

A. I guess he didn't want it after he met me.

Q. Did Mr. Wally send Mr. Amicon to you?

A. No, somebody else sent him.

The foregoing account was corroborated by Amicon's testimony that petitioner was first introduced to him as a prostitute, that he went to her apartment at her request to avail himself of her services, and that he "couldn't go through with it" but "left the money anyway" (R. 2-3, 50). Since, by all accounts (R. 120-121; Br. for Pet. 4), petitioner did not meet Amicon until long after her indebtedness to Tom Wally had been paid off, the continuation of her engagement in prostitution until that meeting completely undermined the claim of duress. Whether petitioner met Amicon in October (R. 50, 119) or December 1957 (R. 4) or not until late in 1958 as the

testimony of Mrs. Jackson suggests (R. 68) is not critical, although the last date seemed more probable to the inquiry officer (R. 77; see R. 111-112).

Finally, additional testimony confirms the conclusion that petitioner's activities were not limited to her arrangement with Wally. Thus Amicon, certainly a witness friendly to petitioner, testified that petitioner's involvement in prostitution stemmed not only from the vacuum cleaner salesman (R. 7) but also: "* * * there was a woman who owned the house, and from what Mrs. Woodby said this woman was in the business of a house for prostitutes, and that is what happened" (R. 6). Amicon also admitted that he had been arrested twice in police raids at petitioner's apartment. On one of those occasions, on February 27, 1959, he had made a written statement to the police that he was paying petitioner for prostitution. Although he testified that that statement was untrue and was made to help her (R. 5; see also R. 42-43), it is not clear what help such a statement might afford. Petitioner also admitted having sexual relations with men introduced to her by persons other than Wally, from whom she received gifts of money (R. 13, 17-18, 26). In sum, petitioner's own testimony and that of her friends wholly discredited her plea that her engagement in prostitution was caused by and was coterminous with duress; the evidence most persuasively supported the finding that the prostitution continued after the compulsion, if any, had ceased.

Deportation is without question "a drastic measure" (*Fong Haw Tan v. Phelan*, 333 U.S. 6, 10); it is certainly not to be invoked where the fact-finder is not affirmatively persuaded by reasonable, substantial

and probative evidence that the grounds therefor have been established. In our brief in *Sherman v. Immigration & Naturalization Service* (No. 80, this Term) we have discussed at length the degree of persuasion with which facts are to be found and the scope of judicial review of such findings, and it seems unnecessary to repeat that discussion here. We think that, on the present record, the court of appeals clearly did not err in holding that the deportation order is "supported by reasonable, substantial and probative evidence" (R. 132). Similarly, we think that the decisions of the special inquiry officer and the Board actually reflect a high degree of persuasion based on the testimony. The inquiry officer found that the chronology of events derived from the testimony was "decisive" (R. 77). And the Board, while resolving all doubtful points in petitioner's favor, found that "it is clear from the evidence that she continued to practice prostitution until at least late 1957 or 1958" (R. 112). Accordingly, unless the administrative officers charged by Congress with the duty of finding the facts are required, as petitioner suggests (Br. 11), to be satisfied "beyond a reasonable doubt," there is no basis for overturning the result below.

For the reasons indicated in our brief in *Sherman, supra*, we do not believe that the reasonable doubt standard is applicable in deportation proceedings. Additional factors make it particularly inappropriate here. *First*, duress has traditionally been viewed as an affirmative defense, to be pleaded and proved by the party relying on it. See Fed. R. Civ. P. 8(c); *Mason v. United States*, 17 Wall. 67, 74; *Klamath Indians v. United States*, 296 U.S. 244, 253; *Mc-*

Cormick, *Evidence* (1954) Section 318. That petitioner bore the burden of proof with respect to the issue of duress is consistent with the usual allocation of that burden and is conceded by petitioner (Br. 14).⁷ It would therefore seem singularly inappropriate to require the government to prove non-duress beyond a reasonable doubt. Even if the burden is on the government to rebut the defense once it has been raised, it would seem sufficient to demonstrate persuasively, from petitioner's own testimony, that the supposed duress falls short of explaining the admitted prostitution. *Secondly*, unlike the petitioner in *Sherman, supra*, who had been a resident of the United States for some forty years, these proceedings were commenced within five years after petitioner's arrival. Whatever added evidentiary rigor might appropriately be imposed in the case of the long-term resident is, therefore, inapplicable here. Compare *Rowoldt v. Perfetto*, 355 U.S. 115, 120.

II

THE COURT OF APPEALS DID NOT ERR IN DECLINING TO REMAND THE CASE TO THE ATTORNEY GENERAL FOR THE TAKING OF ADDITIONAL EVIDENCE PURSUANT TO 5 U.S.C. 1037(c)

Petitioner urges that the court of appeals erred in failing to remand the case to the Attorney General for the taking of additional evidence as authorized

⁷ It should be noted that *Mar Gong v. McGranery*, 109 F. Supp. 821 (S.D. Cal.), cited by petitioner in this connection (Br. 14), was reversed on other grounds in *Mar Gong v. Brownell*, 209 F. 2d 448 (C.A. 9).

by 5 U.S.C. 1037(c).^{*} Although petitioner requested such relief in the court of appeals, petitioner did not even attempt to bring herself within the terms of Section 1037(c). That section provides that a court of appeals may grant an application "for leave to adduce additional evidence" upon a showing "to the satisfaction of such court (1) that such additional evidence is material, and (2) that there were reasonable grounds for failure to adduce such evidence before the agency" (5 U.S.C. 1037(c)). Neither in the court of appeals, nor (were it relevant) in this Court, has petitioner given any indication of what additional evidence she would adduce, let alone that it is material and that there were reasonable grounds for her previous failure to adduce it. Accordingly, there was simply no legal basis for the invocation of Section 1037(c).

It should be recognized, moreover, that petitioner has now told her story under oath on at least three occasions (R. 9, 54, 120); Anthony Amicon has done so twice (R. 1, 49); and petitioner has called two additional, friendly witnesses (R. 67, 70). Such conflicts and discrepancies as there are in the record are largely the product of the divergent accounts which petitioner has given of her activities. In these circumstances it is hardly evident what purpose could be served by a reopening. In all events, petitioner has made no showing of the additional evidence she would present if afforded the opportunity.^{*}

^{*} See footnote 1, p. 2, *supra*.

^{*} It should also be noted that petitioner has never attempted to avail herself of the discretionary relief authorized under Sections 212(h) and 245 of the Act (8 U.S.C. 1182(h) and 1255)

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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OCTOBER 1966.

for an alien who is a close relative of a United States citizen upon a showing that the deportation of such alien "would result in extreme hardship to the United States citizen". Although, in light of petitioner's status as the mother of two minor citizens, such application was expressly invited by the special inquiry officer (R. 72), the invitation was declined, and no subsequent application has been made. The special inquiry officer, in his decision (R. 78-79), nonetheless considered petitioner's eligibility for such relief *sua sponte*. Since the evidence before him indicated that petitioner's children were in the custody of their paternal grandparents, he could find "no basis for considering that her deportation would result in extreme hardship to her children" (R. 79). Notwithstanding that finding, it remains open to petitioner to show, upon proper application, that the facts relevant to such relief were other than those found, or have subsequently changed, or that relief is warranted for some other reason.